In The

Supreme Court of the United States

October Term, 1978

No. 79-160

EUGENE W. CONNELLY,

Petitioner,

vs.

COMMERCIAL TRADING CO., INC.,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

THE UNIFORM COMMERCIAL CODE (WITH ADDENDUM)

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In a 1949 talk to the American Bar Association, Chief Justice Vinson stated:

> "[Petitioners] might be well advised . . . to spend . . . more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision its consequences for other litigants and in other situations. . . ."

In the spirit of Justice Vinson's remarks, and in the hope that it will be considered under Rule 24(4)(5), this supplemental brief is submitted in the belief that its subject — The Uniform Commercial Code, and specifically Article 9, Secured Transactions therein — is of such vital importance to the legal, commercial and financing industries of this country, that it is warranted.

BACKGROUND

In 1942, funded by a large grant from the Maurice and Laura Falk Foundation of Pittsburgh, Pa., supplemented by contributions from the Beaumont Foundation of Cleveland, Ohio, and from 98 business and financial concerns and law firms, the American Law Institute (hereinafter referred to as the "Institute") and the National Conference of Commissioners on Uniform State Laws ("Conference") initiated a project to "uniform" the commercial laws of this country.

While "uniformity" of laws remained a basic purpose of the new code, after ten years of preparation and compilation, two new purposes emerged as more important elements of the code:

> "UCC 1-102
>
> (2)(a) to *simplify, clarify* and *modernize* the law governing commercial transactions;
>
> (2)(b) to *permit the continued expansion* of commercial practices. . . ."

To give force and practical knowledge in the compilation of Article 9, Secured Transactions, the project employed committees of:

> "practicing lawyers, hard-headed businessmen and operating bankers, who contributed generously of their time and knowledge so that, not only current business practice, but *foreseeable future developments* would be covered." (General Comment, 1972 Official Text, page xvii).

The code was promulgated by the Institute and Conference, with the endorsement of the American Bar Association, in the fall of 1951.

In 1953, Pennsylvania enacted the code followed by others until today the code has been adopted by every State with the exception of Louisiana; the District of Columbia and the Virgin Islands.

After the initial code was completed, the Institute and Conference added an official comment to explain the code to the legal industry. An egregious error was made in "explaining" Section 9-106 (more, *infra*, p. 9) which spread to complete distortion of the entire article, to a gradual weakening of it by amendment:

> "By the time the November (1966) meeting was held, 337 non-uniform, non-official amendments had been made to the various sections of Article 9. Some sections had been amended by as many as 30 jurisdictions, each jurisdiction writing its own amendment without regard to the amendments made by other jurisdictions and, of course, without regard to the Official Text, 47 of the 54 Sections of Article 9 had been non-uniformly amended." (Report No. 3 December 15, 1966; Permanent Editorial Board for the Uniform Commercial Code to the Institute and Conference).

The 1966 meeting led to a complete revision, and the latest devastation, the 1972 Official Text, which does away completely

with areas of protection provided in the original text finalized in 1951.

THE LETTER OF CREDIT

This instant lawsuit emerged from a universal type of commercial/financing transaction — the purchase of manufactured goods for resale to retail outlets. The petitioner was a purchaser/reseller. To finance such purchases, there are five basic methods:

1. The documentary letter of credit.

2. The documentary draft for collection.

3. Cash in advance.

4. Open account.

5. Consignment.

Of the five, the first two are the most popular.

A letter of credit is a written undertaking of a bank *made at the request of a buyer* to honor drafts or other demands for payment upon compliance with conditions specified in the credit. Every documentary letter of credit calls for a documentary draft.

A "documentary draft for collection" is a draft, with documents attached, put into a seller's bank for collection through a buyer's bank.

A principal advantage of a letter of credit is that the bank's resources can be used to support the credit, so the seller receives the *bank's* guaranty, not the buyer's. The use of a straight

"documentary draft for collection" carries no guaranty, so its use would depend on the trust and confidence of the buyer and seller.

Of the *trillions* of dollars of bank drafts negotiated annually, the Federal Reserve Bank of New York reported that through July, *monthly* outstanding (unpaid) bank draft acceptances averaged $35,286,000,000 in 1979. The bank's Bulletin No. 1317 (August 20, 1979) reporting from twelve districts showed outstanding (unpaid) acceptances of $36.989 billion in June 1979. Sophisticated investors deal in those unpaid acceptances. Purchasers can be confident that under the Uniform Commercial Code their security is protected in the bank draft (UCC 9-304) and the documents it covers (UCC 9-309). Parties who require earlier security in the "contact rights" in a contract prior to manufacture of the goods which will lead to the bank drafts, are not that fortunate. Prior to 1972, they could obtain that security. The 1972 Official Text removed contract rights as "unnecessary" (*infra*, p. 11).

To the compilers of Article 9, Secured Transactions, the use of a letter of credit or documentary draft for collection was immaterial. In their aim to *simplify, clarify and modernize* and *permit the continued expansion* of commercial practices, they made mention of neither, but provided protection for both. But, for not highlighting the fact, their efforts wound up in confusion rather than clarification (more, *infra*, p. 10).

The bank draft (also referred to as "bill of exchange"), the carrier of documents of title, the basis of "draft acceptances" bought and sold in world-wide financial markets, is the most powerful financing document in international and domestic trade. In the financing industry, it is:

> ". . . an unconditional order, in writing, signed by a person, usually the seller, and addressed to the buyer ordering him to pay on presentation of

> the draft or at some specified future date, the amount of the draft." *Chase Manhattan Guide For Exporters — Methods of Export Financing*, p. 6 (The Chase Manhattan Bank N.A., New York, N.Y.).

The code's definition echoes the industry's:

> ". . . writing . . . signed *and* . . . contain an order to pay . . . *and* . . . on demand or definite time *and* payable to order or bearer." (UCC 3-104) (Pet. 23a[1]).

To assure total protection, the "instrument" (bank draft) is the only document in Article 9, Secured Transactions, which requires *possession* to perfect a security interest (UCC 9-304) (Pet. 22a).

"CONTRACT RIGHTS"; "ACCOUNT"

Possession is paramount in Article 9, Secured Transactions. Whether it is the bank draft (UCC 9-304), or the documents of title (UCC 9-309) negotiated with the bank draft, or the goods themselves (UCC 9-305), *possession* achieves the ultimate security and with that security, the right to the proceeds (UCC 9-306).

To assure a direct path of perfected security from the *signing*[2] of a manufacturer's contract through collection of proceeds from the ultimate debtor, the compilers of Article 9 created two new definitions, "contract rights" and "accounts".

1. References preceded by the designation "Pet." are to the Petition for a Writ of Certiorari.

2. A new requirement. Contracts in excess of $500 must be signed writings (UCC 2-201) (Pet. 24a).

To the period prior to manufacture, a period where a contract can be bought, sold, cancelled, etc., the compilers created "contract rights"; the period after manufacture, "account":

> ". . . any right to payment for goods . . . which is not evidenced by an instrument [bank draft]. . ." (UCC 9-106) (Pet. 22a).

Thus, as the goods remained with the manufacturer (seller) prior to his putting a bank draft (instrument) into his (seller's) bank, the documents covering the goods held the new term "accounts". While the "instrument" (Pet. 23a) is the single most important commercial *document* in Article 9, Secured Transactions, it is the "account" which is the single most important *term*.

An obligor on a manufacturer's contract (the beneficiary of the letter of credit) creates the "account":

> "UCC 9-105(a)
>
> 'Account debtor' means the person who is obligated on an *account*. . . ."

When the manufacturers in this instant lawsuit, as "account debtors" performed the "contract rights":

> "UCC 9-106
>
> 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument [bank draft]. . . ."

into *accounts*:

> "Official Comment to UCC 9-106

> Contract rights may be regarded as potential *accounts;* they become *accounts* as performance [manufacture] is made under the contract."

they became "debtors":

> "UCC 9-105(d)
>
> 'Debtor' means the person who owes . . . performance of the obligation secured . . . and includes the seller of *accounts*. . . ."

In line, when the manufacturers put their drafts "in evidence" and drew against American's[3] letters of credit, the petitioner became a "secured party":

> "UCC 9-105(i)
>
> 'Secured party' . . . including a person to whom *accounts* . . . have been sold."

with a "security interest":

> "UCC 1-201(37)
>
> 'Security interest' . . . The term also includes any interest of a buyer of *accounts*. . . ."

and the documents of the "account" were converted to "collateral":

> "UCC 9-105(c)

3. American East India Corporation, the original defendant in this lawsuit and *assignor* of all interests to petitioner (Pet. 14).

> 'Collateral' means the property subject to a security interest and includes *accounts* . . . which have been sold."

with a totally secured interest in the "proceeds":

> "UCC 9-306(1)
>
> 'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. *The term also includes the account arising when the right to payment is earned under a contract right.*
>
> UCC 9-306(3)
>
> The security interest in proceeds is a *continuously* perfected security interest if the interest in the original collateral was perfected. . . ."

From assignment of the contracts which created the proceeds at issue (Pet. 32), through delivery to customers to create 37 accounts receivable, the petitioner had a totally secured interest under the Uniform Commercial Code and a total right to the proceeds at issue.

THE EGREGIOUS ERROR

Unfortunately, the "hard-headed businessmen and operating bankers" (*supra*, p. 2) did not supply an official comment to explain Article 9 to the legal industry. That was added by the Institute and Conference.

Unfortunately, while "explaining" UCC 9-106, someone had more in mind the relatively unimportant purpose of the code, "make uniform" [UCC 1-102(2)(c)], overlooked "modernize the law" [UCC 1-102(2)(b)] and wrote of the "account":

> "'Account' as defined is . . . the ordinary commercial account receivable."

It was an egregious error and distorted the entire article. Certainly, in no small measure, the error contributed to the "337 non-uniform, non-official amendments" in 47 of the 54 sections of the article (*supra*, p. 3). Not only are accounts receivable not mentioned in the entire article, but the new "account" and an account receivable are at opposite ends of a commercial transaction.

Certainly, accounts receivable are *implied* in the article. Because of the filing provisions, many mistakenly believed the factoring industry (more than $12 billion, annually) was the chief beneficiary of the article, being based on accounts receivable:

> "Factoring is the outright sale of accounts receivable without recourse. The factor assumes the credit risk and handles all details of collection." Irwin Naitove, *Modern Factoring*, p. 18 (Pub. American Management Association).

But the intelligent compilers of Article 9 never mentioned accounts receivable, for a very good reason — avoid confusion. For every account receivable on the books of a creditor, there is an account payable on the books of a debtor. Rather than discuss both, they discussed neither, and combined them in the single section, "Proceeds" (UCC 9-306).

Ironically, if the legal industry, *and the courts in this instant lawsuit*, took the distortion as fact, every factor, *and respondent Commercial herein*, would be *excluded* from Article 9, Secured Transactions.

Section 9-104 excludes non-commercial transactions from Article 9. If a manufacturer "performs" a contract right into an

account and a buyer reneges in establishing a letter of credit, the manufacturer has every right to assign that *account* to a third party for collection. Obviously, that assignment is not a *secured* transaction:

> "UCC 9-104. Transactions Excluded from Article
>
> This Article does not apply
>
> (f) to . . . an assignment of *accounts* which is for the purpose of collection only . . . ."

Equally obvious would be the conclusion that if the courts interpret an *account* as an "account receivable", all factors, with their purchase, and assignment, of accounts receivable for collection, would be excluded from Article 9, Secured Transactions, and lose the protection of their filings (Pet. 15a, par. 5).

The "explainers" went on to further distortions of the article. In recognizing that "Contract rights may be regarded as potential *accounts*" (*supra*, p. 8), they concluded that *contract rights* and *accounts* were one and the same. In compiling the 1972 Official Text, they did an Orwell, "1984" job on Article 9 and eliminated every reference to "contract rights":

> "The term 'contract right' has been eliminated as unnecessary . . . .The term has been troublesome in creating a 'proceeds' problem where a contract right becomes an 'account' . . . ." 1972 Offical Text, UCC 9-106; Official Reasons for 1972 Change.

Not to be facetious, but would one believe that the intelligent "hard-headed businessmen and operating bankers" who put out such an intelligent Article 9 in 1951, intended:

> "*The term also includes the account arising when the right to payment is earned under a contract right*" [UCC 9-306(1)] (*supra*, p. 9)

to mean:

> "The term also includes the account receivable arising when the right to payment is earned under an account receivable."?

ATTORNEY/JUDICIAL CONFUSION IN THE CODE

It has been said that more than 50% of the attorneys in court in criminal cases are ill-prepared. It can be said that close to 100% of the attorneys in cases involving Article 9, Secured Transactions, are ill-prepared. *Every* law student starts out misinformed; *every* textbook that petitioner has read contains errors in Article 9.

In 1975, petitioner wrote to the West Publishing Co. pointing out *contract right/account* errors in a textbook used at a midwest university law school. West did not dispute, but forwarded the letter to the author. The author wrote, quoted the complete "Reasons for 1972 Change" to UCC 9-106, (*supra*, p. 11), including "*Account* is . . . *the ordinary commercial account receivable* [underlined in his letter]", thus absolving himself, and putting the blame squarely on the Institute and Conference.

Sadly, from experience with this and related lawsuits, it is feared that the confusion in Article 9 has spread to the judiciary and, possibly, a reluctance to hear a case based on the code.

Respondent Commercial's complaint was based on filings under the code (Pet. 15a, par. 5) and Walker's ownership of the collateral (Pet. 17a, par. 12). In December 1972, respondent moved for summary judgment "as a matter of law" (Pet. 12, 24). Their memorandum of law did not mention a single section

which guarantees security by *possession* but demanded judgment by right of Commercial's *filing* interest in Walker's *contract rights*. Petitioner's attorneys submitted no law, but defeated the motion (J. Fine) and subsequent appeal, by asserting two facts which required a trial.

On November 24, 1974, petitioner moved for summary judgment (Pet. 14), asserting that there were no facts which required a trial; exhibited documents of title which led to the proceeds at issue and claimed a secured right to the proceeds under Section 9-309 (Pet. 22a) which states that "nothing" in the article is superior to such holdings and they are superior to prior secured interests and, specifically, filing. Respondent cross-moved, renewing their earlier claims of a superior secured interest by *filing*.

The court (J. Rosenberg) held the papers for 67 days and then, on *Friday*, January 31, 1975, referred them to the court (J. Fine) who had ruled on respondent's 1972 motion for summary judgment. On *Monday*, February 3, 1975, Judge Fine denied both motions with the surprising ruling that issues were the same as previously ruled on, despite the facts (a) it was petitioner's first motion for summary judgment, (b) in opposing Commercial's motion in 1972, petitioner's attorneys had not quoted a single section of law and (c) petitioner's 1974 motion was based 100% on the law. Judge Fine retired later that year.

On January 31, 1976, Commercial again moved for summary judgment, basing the motion on the principle of collateral estoppel of the Philadelphia Action decision (Pet. 21). Despite the facts (a) the trial was only three weeks away, (b) an interim decision (Philadelphia Action, July 1975) should not serve as a basis for jurisdiction over an earlier action (this instant action, 1968) (*Barber v. Intercoast Jobbers and Brokers*, 417 S.W. 2d 154) and (c) the State of New York's rules of priority that between two legal issues, first in time, first in right, Judge Rosenberg did grant summary judgment but stayed entry

of an order pending submission of "additional affidavits . . . supported by documentary evidence . . ." (Pet. 9a).

Petitioner submitted his affidavit, quoted the code (UCC 9-309); attached seven bills of lading (documents of title) proving ownership of the goods (UCC 9-305) and copies of three documentary letters of credit against which the bills of lading had been negotiated. Commercial was unable to submit a single item of "documentary evidence."

Judge Rosenberg retired December 31, 1976 without signing his memorandum decision into order. The case was assigned to Judge Grossman and apparently the "fear of the Code" continued. In December 1977, Judge Grossman granted petitioner's motion for a trial by preference (Pet. 12a) but instead of hearing the case in his Part 6 where it had been since 1972, he referred it back to the calendar clerk.

On February 21, 1978, the case was assigned for trial to Madame Justice Shainswit. At the outset, she gave every indication of trying it (Pet. 28), but after obtaining the files of the case and studying them during a brief recess, she shut the trial off and made the "law of the case" Judge Rosenberg's memorandum decision (Pet. 7a) and granted summary judgment to respondent.

The Appellate Division affirmed Judge Shainswit's summary judgment decision (Pet. 29). The New York State of Appeals denied the motion for leave to appeal (Pet. 1a).

At no time, in the seven years that this case was assigned to a Part for trial, has any court agreed to try the case, or decide a motion, based on the Uniform Commercial Code. Further, it would appear that courts *avoided* the responsibility of having to make a decision in the code.

The protection of the laws of Article 9, Secured Transactions, should be the easiest of all laws to administer:

1. Who owned the documents of title?

UCC 9-309 — "Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . . ." (Pet. 33).

2. Who owned the collateral?

UCC 9-305 — "A security interest in . . . goods . . . negotiable documents . . . may be perfected by the secured party's taking possession of the collateral . . . . A security interest is *perfected by possession* from the time possession is taken without relation back . . . " (Pet. 34).

3. *That* party has a totally secured interest in the proceeds.

UCC 9-306 — "(3) The security interest in proceeds is a *continuously perfected security interest* if the interest in the original collateral was perfected . . . ."

The record in this petition and similar lawsuits could be the simplest of records:

1. Copy of the bills of lading (documents of title) against which the goods were imported;

2. Copy of bank's "Advice of Debit" (with attached documents of title) negotiated to secured party;

3. And, to embellish the record though not a document of title, a copy of the letter of credit against which the bank draft, and documents of title, was negotiated.

In the instant appeal under petition, copies of each — bills of lading, advices of debit and letters of credit — were in

petitioner's Appendix to the Appellate Division, but they meant nothing to the court. Respondent had no records of any transaction and did not submit an Appendix.

In 1976, petitioner sued respondent for release of funds held in connection with the Commercial/Walker Accounts Receivable Agreement (Pet. 37). Commercial moved to dismiss on statute of limitations. Despite the fact that petitioner exhibited copies of the agreement and the filed U.C.C. Financing Statement (Form 1)(Pet 15a, par. 5) both current on the day exhibited, the court (J. Kirschenbaum) dismissed two complaints with the astounding ruling that "No provision of the Uniform Commercial Code is applicable . . . ."

One court, in a related case (Philadelphia Action, Pet. 21), did venture into the code, with drastic results. Regrettably, it can be demonstrated that *every* conclusion in the code was incorrect. One example:

> "Section 9-302 provides that a financing statement must be filed to perfect all security, with certain specific exceptions. Commercial had perfected by filing in this case so there is no need to discuss the exceptions." (400 F. Supp. 161, f. 16).

The first "specific" exception is:

> ". . .a security interest in collateral in possession of the secured party under Section 9-305." (Pet. 25a).

The court had "summarized" earlier (400 F. Supp. 153) that American had imported the collateral for its own account, thus becoming a secured party under UCC 9-305 (Pet. 25a) by possession of the collateral. Clearly, American's possession (UCC 9-305) took superiority over Commercial's filing (UCC 9-302).

Judge Green's post-trial consideration of the code began in very confusing circumstances. The complaint was based on American's attempt to collect proceeds of an Ideal Shoe Co. "account receivable." Under UCC 10-102, all previous acts regulating accounts receivable had been repealed, bringing them under the code, yet the court had received from plaintiff American's New York attorney (33 *partners*) and Philadelphia attorney (104 *partners*):

(a) a 37-page Trial Brief with 19 pages under the title,

The U.C.C. Does Not Apply To The Instant Transactions.

(b) a 20-page Reply Brief of Plaintiff *received post-trial* with four pages under the heading *The Code Does Not Apply.*

(c) a 114-paragraph Request For Findings of Fact and Conclusions of Law, with not a single paragraph devoted to law of any type.

Aware of this instant action, Judge Green waited more than two years for a trial and decision in the New York action.

Aware of the decision being awaited in the Philadelphia Action, the New York courts refused to hear the New York action.

It was during that two-year wait that petitioner made his study of the code and facts of the Commercial/Walker financing relationship which resulted in the Perjury Papers (Pet. 23).

Ironically, by finding that Bank of America had negotiated the documents of title to American (400 F. Supp. 151); that States Marine Lines had released the collateral to American (400 F. Supp. 152) and summarizing that American had imported for its own account (400 F. Supp. 153), Judge Green had, within the Code: "Nothing" in the Code limited the rights of a holder of documents (UCC 9-309) (Pet. 22a); security interest

gained by possession of collateral (UCC 9-305) (Pet. 25a); and security interest *continuously* perfected in proceeds (UCC 9-306) (Pet. 26a), all favoring American and all protecting American's right to the proceeds. By ruling within the code, a brief, concise memorandum decision could have been written (and the following six years of court confusion and inundation avoided) in 1973. Instead, in 1975, Judge Green released a confused 53-page memorandum decision granting Commercial 26% of the proceeds because, he said, American had "converted" a contract right, despite the fact that no party exhibited a contract at trial. Couldn't, because none existed. American had delivered their collateral against Ideal's telephoned promise to pay on receipt of the goods.

WASTED BENEFITS OF THE CODE

Because of the confusion in the code and because of the possibility that courts are reluctant to hear cases in the code, a number of benefits in the code are being wasted.

One example: One of the greatest boons to the growth of our national economy, and growth of employment, was the advent of consumer credit/installment buying. Before the code, most jurisdictions held that a seller had to proceed against a defaulted contract within six years. With proper understanding of the code, every installment contract could be amended to give the seller a *continuous* right to proceed in a default.

The Internal Revenue Service puts all of us on notice that their right to proceed against a fraudulent tax return is *continuous;* there is no statute of limitations:

> "Internal Revenue Code
>
> Sec. 6501(c)(1) — In the case of a false or fraudulent return . . . a proceeding in court . . . may be begun . . . *at any time.*"

Should not an honest seller of goods have a *continuous* right to proceed against a default or conversion? The code eliminates a statute of limitations:

> "Uniform Commercial Code
>
> Sec. 9-306(3) — (3) The security interest in proceeds is a *continuously* perfected security interest . . . (until) . . . ten days after receipt of the proceeds . . . " (Pet. 26a).

CREDENTIALS OF PETITIONER

The original proceeds at issue in this lawsuit ($162,395.47, Pet. 20), by Commercial's withdrawal of all claims in their complaint except a single account receivable in an escrow account (Pet. 30) in order to escape trial on facts and law, shrunk to $66,363.11. Petitioner was awarded $51,239.15 which, with accumulated interest, totaled $84,636.64. In August 1978, petitioner's original attorneys who already had been paid $25,569.93 (July 18, Pet. 13), petitioned to enforce an attorney's lien for $56,535.12 against the $84,000 award. Petitioner cross-moved for an order "directing [the attorneys, American and Connelly] to appear at a place and time specified by the Court . . . to determine a total amount of legal fees to be paid, if any, [to the attorney]."

Where the elapsed time to await a decision in more than twenty motions that petitioner had been involved in that court (Part 1, Special Term, N.Y. Sup., N.Y. Cty.) ranged from three weeks to five months, the decisions in the petition and cross-motion were made in one day, in favor of the attorney. Those decisions, also, went the "two-word route" of New York's higher courts ["affirmed", without opinion in Appellate Division; "denied", without opinion (leave to appeal) in Court of Appeals], despite numerous citations (including the court appealed to) that

"the lien must be measured by value of services" and "A court is without power to summarily determine amount of attorney's fee."

A principal feature of the attorney's petition was the naming of a number of partners who had "worked" on this lawsuit, with the names of their law schools noted (Harvard predominated). So, in the reluctant belief that credentials may be more important than fact, logic and law, herewith are some of the credentials of petitioner. Possibly they may not be too far below those of the "hard-headed businessmen" who worked so hard to compile the Code's Article 9 in 1951 (the good one):

More than thirty-five years experience in international trade and finance, including:

President, American East India Corporation, an export-import company.

President, Emocee Traders, Ltd. Canada, a footwear importer.

President, Manhattan Overseas Co., Inc., a freight forwarder.

President, Bharat Overseas Corporation, an import agent.

Director, Hong Kong Commercial House, Ltd., Hong Kong.

As President of American East India Corporation (activated in 1955 as a one-man operation):

a. Initiated, and conducted American negotiations, to return General Motors to India in the early 1960's in licensing operations to manufacture trucks and

earthmoving equipment after their expulsion by the Government of India in mid-1950's.

b. Sales agent (India) for General Motors Electromotive Div.

c. American negotiator for licensing agreements for manufacture in India: Westinghouse (motors); Kimberley Clark (paper); Federal Mogul Corporation (bearings); Clearing Machine, Chicago (heavy-duty presses).

d. American negotiator with Export Import Bank ("Eximbank") and Agency For International Development ("A.I.D."), Washington D.C. for loans to companies in India.

e. American agent for largest group of industrial companies in India (Birla Group, listed in Eximbank files in excess of 100 companies).

f. Against the strictest of strict financing and shipping regulations of government agencies, shipped more than $70 million of U.S. goods, financed by Eximbank, A.I.D. and A.I.D./Government of India, jointly.

SUMMARY

There is one basic fact in a commercial transaction — the transaction *must* be covered by a document.

There is a basic fact in the Uniform Commercial Code — *possession* is paramount — "instruments" (9-304); "goods" (9-305); "negotiated documents of title" (9-309).

If those two facts are accepted by the courts, complications when adjudicating in the code would be minimal.

CONCLUSION

Certainly, for selfish reasons, petitioner prays that this petition for a writ is granted, but in the solemnity of truth it is hoped that Article 9, *Secured Transactions*, of the Uniform Commercial Code, will be recognized for what it is – a code of law to protect a party with an honest, *secured* right to the proceeds of a commercial *transaction* — which petitioner did, and does, have, and could have proven in court, if the courts of New York State had permitted him to be heard in court.

Respectfully submitted,

Eugene W. Connelly
Petitioner, Pro se

ADDENDUM

IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE (Res. Br. 1[4])

Respondent Commercial is fortunate to be represented by a firm with many lawyers. This instant lawsuit is an initial attempt by Commercial to convert almost $500,000 legally due petitioner and two partners of Walker, American's sales agent. Commercial's counsel was given ample warning of the attempted conversions (Pet. 36). Nevertheless, they put forward an attorney to support the deceit. As lies were exposed, new attorneys would appear. To date, seven Weil Gotshal & Manges attorneys have submitted papers to New York State courts on behalf of respondent. The veracity of present counsel in opposition is no improvement.

Immediately, the day the Perjury Papers (Pet. 23) were completed a copy was hand-delivered to Grossman, in the naive belief that as an attorney, with his Philadelphia Action trial testimony perjury exposed, he would take steps to end this lawsuit. Grossman stonewalled. The Perjury Papers were delivered to respondent's new attorney who, although they had forced postponement of a May 1, 1974 pre-trial conference date to "familiarize" themselves with the case, had not yet put a paper into court on behalf of Commercial (Pet. 36).

Upon completion of deposition and delivery of the 56 exhibits to substantiate the perjury accusations and fraud (Pet. 23), again in a naive belief, it was expected that respondent's attorney would honor their Code of Professional Responsibility

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4. References preceded by the designation "Res. Br." are to the "Brief in Opposition to Petition for a Writ of Certiorari" of respondent.

and "call upon his client to rectify same" [DR7-102(B)(1)] and if Grossman did not, they would "reveal the fraud to the affected person or tribunal."

Obviously the latter did not happen, because on January 31, 1976 the attorneys moved for summary judgment (Pet. 24, 7a) and exhibited the complete memorandum decision of Judge Green (400 F. Supp. 141) gained by the perjured testimony of Grossman, in defiance of their ethical code that they should not "knowingly use perjured testimony or false evidence" [DR7-102(A)(4)].

By 1977, petitioner feared that Commercial would succeed in using the Philadelphia Action decision to keep this case from trial. On February 4, 1977, petitioner moved in District Court (Ea. Pa.) for "Relief From (Judge Green's) Order, pursuant to Rule 60(b) — (2) newly discovered evidence; (3) fraud; (6) other reasons, and the power of the Court to set aside an order gained by fraud upon the Court. . . ." Judge Green denied the motion "as filed more than one year after the entry of the order from which relief is sought." *That* decision was appealed and affirmed [568 F.2d 768 (3rd Cir. 1978].

The Perjury Papers were compiled and circulated in July 1974. The denial of petitioner's 1977 motion for relief from order was affirmed in 1978. If the courts were to believe that the 1978 ruling was an affirmation of Judge Green's decision in the Philadelphia Action (Pet. 21), and this instant case could be kept from open trial, the Perjury Papers would be negated. Respondent set out to deceive the courts.

At trial, respondent counsel Lemberger, in direct defiance of the code of ethics that he would not "knowingly make a false statement of fact" [DR7-102(A)(5)] told the court that the Third Circuit had affirmed Judge Green's decision (Pet. 23).

At appeal to the Appellate Division, petitioner disclosed to the court that respondent attorney Simon (co-counsel at trial), in his Respondent's Brief, was also attempting to deceive the court that the Third Circuit had affirmed Judge Green. At oral argument, Simon apologized, attributed the "mistake" to careless reading of the Federal Reporter and volunteered to submit a correcting paper.

Now, to this Court, we have attorney Miller (Res. Br. 2):

> "The controlling facts underlying this suit as set forth in *American v. Ideal*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd* [emphasis in Res. Br.[5]], 568 F.2d 768 (3rd Cir. 1978)."

While attorney Simon did have the excuse of "careless" reading to fall back on, attorneys Lemberger and Miller have no such escape. On August 14, 1975, in the Philadelphia Action, *Ideal* (for Commercial) filed a Notice of Appeal in the Third Circuit with "Alan B. Miller, Esquire, Weil, Gotshal & Manges" as attorney "for Ideal Shoe Company" and posted a supersedeas bond. Miller and Lemberger directed the appeal from New York. Copies of correspondence and documents were sent to them, individually, including the Third Circuit's Order (J. Seitz) granting Commercial's motion to dismiss their appeal (Pet. 22).

Lemberger (at trial), Simon (at appeal) and Miller (herein), each was aware of the true facts and for them to attempt to deceive three courts, no matter the level of jurisdiction, was totally deceitful with an intent to have Commercial's conversion plot succeed.

At the Philadelphia Action trial, respondent's general counsel, Grossman, told a totally perjured story of (a) Commercial having financed Walker from 1964 until July 1967 when (b) Walker applied for a $54,000 letter of credit at three

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5. Emphasis also shown in Table of Authorities under Table of Contents of Respondent's Brief.

meetings during August/November 1967 but (c) Commercial did not establish any letters of credit because (d) Walker was heavily in debt to Commercial and (e) could not put up margin to back the letters of credit (400 F. Supp. 149); and Commercial made advances to Walker to cover payroll and other expenses (400 F. Supp. 147).

To supply a "Statement of the Case" for his brief, counsel Miller parroted the Grossman perjury knowing full well that the 56 exhibits delivered to Weil Gotshal in connection with the January 29, 1975 deposition of petitioner (Pet. 23) included at least one exhibit to expose each of his iniquitous statements:

> "From February 19, 1964 until at least July, 1967 CTC provided financing to Walker . . ." (Res. Br. 2).

Truth:

Exhibit 5 (to Perjury Papers) consisted of Walker invoices financed by Commercial from August 1, 1967 through December 31, 1967.

Exhibit 6 — $76,500 of Commercial-approved Walker letters of credit, August 1, 1967 through December 31, 1967.

Exhibit 7 — Letter of credit applications submitted by Walker during August/December 1967, each stamped approved by Commercial.

Exhibit 37 — a Walker letter of credit application dated November 19, 1967 bearing the handwritten approval of "Gerald J. Grossman."

Exhibit 48 — a chart listing by dollar amount and individual steamer names, 46 shipments totalling $157,588.10 financed by Commercial for Walker during August/December 1967.

* * *

> "CTC also advanced money to Walker to cover Walker's payroll and other expenses." (Res. Br. 2).

Truth:

By the Commercial/Walker Accounts Receivable Agreement [400 F. Supp. 147 (f.2)] Commercial contracted to purchase Walker accounts receivable and pay Walker 80% at time of purchase. Grossman attempted to deceive the court into believing that the money advanced at time of purchase were loans.

Exhibit 47 — was an extract (pp. 20-21) from "Modern Factoring" by Irwin Naitove (Pub. American Management Association) which stated:

> "These cash advances are not loans since they are made against money due to the client at a later date. On the client's balance sheet there is no liability to the factor for funds that have been advanced."

* * *

> ". . . because Walker was experiencing financial difficulty, CTC insisted that Walker provide it with additional collateral . . ." (Res. Br. 2).

Truth:

Walker *never* provided collateral. Commercial *purchased* Walker's accounts receivable. Commercial's first purchase, $20,475.44, was made on March 3, 1964. Against that

$20,475.44. Commercial "advanced" $14,000 to Walker. From that day, *and to this very day*, Commercial held, and should be holding, balances to the credit of Walker.

* * *

> "As part of this agreement, Walker assigned to AEIC the Anthony and Ideal purchase orders . . . despite the fact that the Security Agreement . . . prohibited Walker from transferring or encumbering any of its accounts, contract rights or other collateral." (Res. Br. 3).

Truth:

The Uniform Commercial Code effectively negates any such prohibition.

> "UCC 9-311
>
> The debtor's (Walker's) rights in collateral may be voluntarily or involuntarily transferred . . . notwithstanding a provision in the security agreement prohibiting any transfer. . . ."

* * *

> "Lawsuits were soon commenced by both CTC and AEIC as a result of their dispute over ownership of these Walker contract rights." (Res. Br. 3).

Truth:

Strictly a red herring to divert the Court from the truth. The only "dispute" was ownership of goods. In this instant

lawsuit, Paragraphs 10 through 15 of the complaint (Pet. 17a) speak for themselves.

American's complaint in the Philadelphia Action was a brief eight-paragraph, two-page document limited strictly to a demand for judgment because of Ideal's failure to pay for goods delivered against a promise to pay.

American's 1971 lawsuit against Commercial (Pet. 35) was fraud, etc.

Petitioner's three lawsuits against Commercial (Pet. 37) were to recover funds held illegally by Commercial.

"Contract rights" were never a part of any complaint in any action. Commercial interjected "contract rights" on the opening day of trial in the Philadelphia Action when it was patently obvious that American owned every document of title and the goods at issue.

* * *

> "When a dispute arose as to the sufficiency of Connelly's proof, a trial on the issue of damages was ordered. . . ." (Res. Br. 5).

Truth:

Totally untrue! A *completely* false statement! While respondent's foregoing attempts to deceive the Court take on an appearance of respectability by references to Judge Green's decision in the Philadelphia Action (400 F. Supp. 141), this statement has absolutely *no* substance.

At every point possible, petitioner exhibited the bills of lading against which the goods that created the proceeds at issue, were imported, and which give total protection under the code (UCC 9-304, 9-305, 9-306, 9-309).

A commercial/financial transaction is based on documents. *Proof* can be verified *only* by the production of documents. At trial, Commercial exhibited no documents. To the Appellate Division, Commercial did not submit an appendix or financial documents of any type.

After Judge Rosenberg retired without signing his memorandum decision into an order, and Judge Grossman would neither sign it, nor order the case to trial, in total frustration, in 1977 petitioner wrote a series of letters to the Administrative Judge (Pet. 27), each opposed by respondent's attorneys, trying to get the case to trial.

In November 1977, petitioner moved (granted, Pet. 12a) for a Trial By Preference (in tenth year of lawsuit). A trial was ordered only because that motion was granted.

This lawsuit was born in deceit in 1968, nurtured through the courts for more than ten years in deceit and for respondent to now state that a trial was *ordered* (by whom?) because "a dispute arose as to the sufficiency of Connelly's proof" is proof positive that respondent's attorneys will continue that deceit to *any* court.

REASONS FOR DENYING THE WRIT (Res. Br. 6)

Jury Trial (Seventh Amendment)

From the time this lawsuit was filed, a jury trial was demanded. Judge Grossman granted petitioner's motion for a trial, but referred the case to the calendar clerk. In Assignment Part (J. Rubin) (Pet. 28), petitioner stated that he would limit his right to the proceeds strictly on the law, and so waived a jury trial. In no way was that waiver volunteered to permit the court to grant summary judgment without trial.

Due Process (Fourteenth Amendment)

The lower courts were informed that petitioner was denied due process. On June 6, 1977, a letter was sent to Judge Dudley:

> "I refer to the Weil, Gotshal & Manges letter of June 2nd.
>
> That must be a big law firm. To date, I have contended with Messrs. Stanton, Miller, Bernfeld, Lemberger, Bonacquist, Weiss and now, Mr. Simon.
>
> One would think that if so much manpower has to be diverted to this one case, one would want to end it quickly with a one day trial.
>
> But one could be wrong. It appears now as if the fight is to keep the lawsuit from going *to* trial. I trust they will not be accommodated.
>
> Mr. Simon suggests a novel approach — a conference!
>
> For almost ten years we have talked, talked, talked. I made four depositions; appeared in court for motions many times; appeared at Weil Gotshal's office re their client's perjury; appeared at referee hearings, and now Weil Gotshal wants a conference.
>
> If one is held, so be it, but I will tell you my position in advance. There has been no order issued in this lawsuit. I will ask for a brief one day trial. If that is not granted, *I will ask that an order be issued, so it can be appealed.*
>
> *cc: Judge Grossman*
> Weil Gotshal & Manges"

No conference was held. Six months later Judge Grossman ordered a trial (Pet. 12a). Judge Rubin assigned the case for trial, but Judge Shainswit denied a trial on facts *or* law (Pet. 28). A notice of appeal (to the Appellate Division) was filed May 3, 1978. Herewith, is an extract from petitioner's Pre-argument Statement filed with the notice:

"*Grounds For Reversal*

Among others:

1. *Denial of due process of law*

> Court made 'law of the case' a memorandum decision, not signed into an order, of a judge now out of court. By doing so, defendants were barred from appealing the order if, in fact, any judge did sign the memorandum into an order.
>
> On April 1, 1976, Judge Samuel Rosenberg. . . .
>
> At no time has an order in regard to summary judgment in this case been in existence so that it could be appealed."

The antiquity of respondent's citations is interesting — 1878, 1889, 1907, 1943, all prior to the birth of the Uniform Commercial Code.

DENIAL OF THE PROTECTION OF THE LAW (FOURTEENTH AMENDMENT)

> "No State shall . . . deny . . . the equal protection of the laws."

Petition at page 40 states:

> ". . . Article 9 gives to every party. . .complete protection . . . .
>
> When Governor Rockefeller signed the Uniform Commercial Code legislative bill into law in 1964, *that complete protection* was extended to every user of a letter of credit in New York State, including the petitioner herein."

When the trial court refused to permit the petitioner to cite the law which guaranteed his rights to the proceeds ["I would like to read the law into the record" — "No, sir" (Pet. 28)], petitioner was denied "the equal protection of the laws" guaranteed by the Fourteenth Amendment.

LENGTH OF PETITION PAPERS

Petitioner sincerely regrets the length of these papers.

This lawsuit should have been dismissed by summary judgment in 1968 (Pet. 3-8). If it went to trial, it could have been decided on law with hardly more then five minutes testimony (Pet. 27). If it was necessary to prove the fraud of the case, petitioner had subpoenaed Commercial's Grossman (Pet. 23) to appear in court on opening day of trial. Grossman flaunted that subpoena but his non-appearance became moot when the court granted summary judgment.

By that summary judgment, petitioner was denied rights under the Fourteenth Amendment. In this petition that fact could be stated simply, but to prove, by papers alone, some of the fraud of respondent and deception of attorneys to prevent that fraud from being exposed, takes much longer than petitioner would like, and I believe the Court also, so I apologize sincerely, for the extended length of the papers.

CONCLUSION

> "Petitioner Connelly . . . suffering from 'great emotional disturbance . . . bitterness and confusion' (Pet. 6a)." (Res. Br. 2).

The balance of the judge's statement was ". . . Indeed, he stated . . . this case has become the main interest in his life." (Pet. 6a).

Although the trial court granted summary judgment and refused to hear any testimony on facts and law (Pet. 27), she filed a six-page "Findings . . ." (Pet. 2a), but gave no sources for them. The trial transcript, however, does belie the above statement:

> "THE WITNESS: I understand completely, Your Honor, but you see I am a retired man now and I have to steer my life some way, and my life is dedicated to getting the Uniform Commercial Code accepted as the code of business . . ." (T141).

While, for purely selfish reasons, it is hoped this petition for a writ of certiorari is granted, it is also hoped that the petition is granted so that the business and financial communities of this country can be shown that they do have a code of law to protect them — the Uniform Commercial Code.

Respectfully submitted,

Eugene W. Connelly
Petitioner